UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HELEN E. COLTRANE	)	
	)	
v.	)	DOCKET NUMBER
	)	NY04328310492
DEPARTMENT OF THE ARMY	)	DATE: 21 DEC 1984
	)	
	)	

OPINION AND ORDER

Appellant petitioned for appeal from the action of the Department of the Army reducing her in grade from the position of Morale Support Officer, GS-301-9, to the position of Data Transcriber, GS-356-3, effective June 26, 1983. The action was effected under 5 U.S.C. Ch. 43, based on appellant's alleged unacceptable performance in two of the critical elements for her position. After affording appellant a hearing, the presiding official issued an initial decision finding that both the notice of proposed removal and the notice of decision ordering appellant's reduction in grade were defective and failed to meet the statutory requirements of 5 U.S.C. § 4303(b)(1). Therefore, the presiding official reversed the reduction in grade action.

The agency filed a timely petition for review contending, in relevant part, that the presiding official erred by raising and deciding sua sponte that the proposal and decision notices were deficient and constituted error per se. Appellant responded in opposition to the agency's petition. The petition for review is hereby GRANTED pursuant to 5 U.S.C. § 7701(e)(1).

By notice dated April 15, 1983, the agency proposed appellant's removal for unacceptable performance.1/ The proposal notice prepared by appellant's supervisor stated, in relevant part:

> 2. This proposal is based on your inability to meet the requirements for your position as outlined by your major and critical job elements and the tasks and standards based on these elements that I explained to you on 15 September 1982 and which you acknowledged by your signature on 15 October 1982 (Incl 1). On 29 September 1982, you were notified by letter (Incl 2) of your unacceptable performance and that should your performance not show marked improvement, an unsatisfactory appraisal would be issued when due. During this warning period (30 September 1982 - 15 March 1983), you failed to improve your performance to an acceptable level.
>
> 3. Attached at Inclosure 3, you will find your appraisal. On it you will find, in detail, the failures that are the basis for my proposed action. Generally, they are:
>
> a. You failed to supervise your employees in an adequate manner.
>
> b. You failed to supervise facility modernization in an adequate manner.

1/ See agency file, tab 1.

c. You failed to insure adequate program development.

Both a and b above are listed as critical elements and are therefore essential in your overall job performance.

(Emphasis supplied.)

Under the critical element of "Supervise", the performance standards for appellant's position consisted of the following 2/:

1. Be outwardly positive once decisions are made to set example of positive attitude.

2. All employees will have accurate and complete performance standards. Complete appraisals on time.

3. Maintain current IDP on subordinates.

4. Disciplinary action must be carried out timely and fairly.

5. Initiate awards request or negative replies before soldier/civilian depart.

6. Know where your employees are, what they are doing and how they are doing it.

2/ See agency file, tab 3.

7. Capable of understanding orders and transmitting in an intelligible manner to subordinates.

8. Makes maximum effort to insure that CPO gives your vacancies adequate attention.

9. a. Know the provision of both programs (i.e., AAP).

b. Execute them and do not commit violations against them.

Appellant's performance appraisal, referred to in the notice of proposed removal as Inclosure 3, contained the following evaluation of appellant's performance under the critical element of "Supervise"3/:

1. Employee was outwardly negative and continuously displayed displeasure with decisions.

2. Employee was paid overtime to complete appraisals on time and still failed to meet suspense.

3. Met.

3/ See agency file, tab 2.

4. Disciplinary action directed was not carried out at all.

5. Met.

6. Was unable to control employees' whereabouts or job accomplishment.

7. Totally incapable on interpreting orders or transmitting them to subordinates.

8. Made little effort to insure that the CPO system was supporting our desires to fill positions.

9. Met.

The performance standards for the critical element of "Facility Modernization" were as follows 4/:

1. Review Master Plan semiannually.

2. Maintain accurate list of the Installation Commander's priorities, both NAF and AF. Update semiannually.

3. a. Prepares 1391's in coordination with DEH.

4/ See agency file, tab 3.

b. Insure all paperwork supporting projected projects is submitted on time and accurately.
c. Review concept designs to insure they reflect Installation Commander's desires.

4. a. Be innovative in approaching the ever increasing problem of lack of resources.

b. Use internal resources to improve existing facilities.

c. Encourage program directors to use self-help for facility improvement.

d. Encourage program directors to make money that can be used to renovate and improve existing facilities.

Appellant's performance appraisal, referred to in the notice of proposed removal as Inclosure 3, contained the following evaluation of appellant's performance under the critical element of "Facility Modernization"5/:

1. Reviewed Master Plan when required.

2. Accomplished.

5/ See agency file, tab 2; and attachment to the petition for appeal, file tab 1.

3. a. Accomplished.

   b. Was unable to meet suspenses.

   c. This responsibility was removed because of employees's inability to correctly interpret the Installation Commander's desires.

4. a. Employee has a "we did not do it that way before" attitude.

   b. Does not require that subordinates neither maintain nor improve their facilities using internal resources. This includes keeping the facilities clean.

   c. Same as b. above.

   d. There is no evidence that employees receive any encouragement or guidance and direction on this or any other subject.

The notice requirements for proposing a reduction in grade or removal for unacceptable performance are set forth in 5 U.S.C. § 4303(b)(1), and provide:

> (b)(1) An employee whose reduction in grade or removal is proposed under this section is entitled to-
> (A) 30 days' advance written notice of the proposed action which identifies-

> (i) Specific instances of unacceptable performance by the employee on which the proposed action is based; and
> (ii) The critical elements of the employee's position involved in each instance of unacceptable performance. . . .

(Emphasis supplied.)

The Board concurs with the findings of the presiding official, initial decision at 5-6, that the notice of proposed removal and the performance appraisal incorporated therein did not cite any specific incidents of unacceptable performance and did not contain any information such as when, where, what, and how appellant's job performance was deficient. The examples of unacceptable performance cited for the two critical elements are broad, vague and completely lacking in specificity of fact.

The deciding official's letter of decision ordering appellant's reduction in grade, dated June 17, 1983, stated in relevant part 6/:

> After careful consideration of your attorney's written reply dated 12 May 1983 and your oral reply on 18 May 1983, I have determined that the proposed removal is supported by the substantial evidence presented in the referenced letter. It is evident to me that despite your having received continuing

6/ See agency file, tab 11.

> detailed guidance and performance counseling throughout the rating period you are unable to achieve the performance standards and successfully perform the duties of your position as Morale Support Officer, GS-301-09. Two critical elements of your position, supervision and facility modernization, as communicated to you on DA Form 4968, Job Performance Planning Worksheet, 15 October 1982, were not met. It is evident to me that no additional effort on the part of management will be successful in raising your level of performance in your present position to even a minimally acceptable level.

The statute, 5 U.S.C. § 4303(b)(1), requires that an employee whose reduction in grade or removal is proposed is entitled to:

> (D) A written decision which-
> (i) in the case of a reduction in grade or removal under this section, specifies the instances of unacceptable performance by the employee on which the reduction in grade or removal is based. . . .

(Emphasis supplied.) The Board concurs with the finding of the presiding official, initial decision at 7, that the decision notice, which simply refers to the inadequate removal proposal and performance appraisal, fails to specify

the sustained instances of unacceptable performance on which the reduction in grade action was based.7/

The Board has determined that the notice requirements of 5 U.S.C. § 4303(b)(1) are clearly procedural, and are subject to a harmful error analysis. Sandland v. General Services Administration, MSPB Docket No. PH04328310205 at 9 n.11 (October 22, 1984). See Baracco v. Department of Transportation, MSPB Docket No. DC07528IF0895 (April 25, 1983), aff'd, No. 83-1156 (Fed. Cir. May 18, 1984). The agency contends that the presiding official erred by raising and considering the notice issue sua sponte. Contrary to the agency's assertion, however, appellant specifically challenged the vagueness and lack of specificity of her performance appraisal, which formed the basis for the removal proposal, in her written reply to the removal proposal (which she incorporated in her petition for appeal), in her oral reply, and at the hearing before the presiding official.8/ The presiding official did not raise the notice

7/ Where the charges and instances of unacceptable performance are stated with sufficient specificity in the proposal notice, it is not necessary to repeat them in the decision notice in order to satisfy the requirement that the specific instances of unacceptable performance be stated. A direct reference to the charges and instances of unacceptable performance found sustained is sufficient.

See, e.g., Johnson v. Department of the Treasury, 11 MSPB 415, 419 (1982), and the cases cited therein.

8/ See agency file, tabs 9 and 10; petition for appeal, file tab 1; initial decision at 4 n.3.

issue sua sponte. In any event, the Board has stated that it may be appropriate for a presiding official to address sua sponte an error that implicates an employee's basic procedural rights, when cognizance is necessary to prevent manifest injustice. See, e.g., Chance v. Department of Transportation, MSPB Docket No. SL07528lF0621 at 7-8 (September 20, 1983); Knab v. National Aeronautics and Space Administration, 12 MSPB 81, 84 n.1 (1982).

The purpose of the notification of charges to an employee is to provide a fair opportunity to oppose the agency action by informing him or her of the reasons for the proposed action with sufficient particularity to apprise him or her of allegations to be refuted or acts he or she must justify. Adams v. Department of Transportation, MSPB Docket No. NY07528lF0424 at 9-10 (April 25, 1983), aff'd, No. 83-1155 (Fed. Cir. May 18, 1984). The Board concurs with the presiding official that the proposal and decision notices in the instant case lacked sufficient factual specificity to apprise appellant of the allegations she must refute or the acts she must justify, and that such error implicated her basic procedural rights. Therefore, the reduction in grade action may not be sustained because of the harmful error committed by the agency under 5 U.S.C. § 7701(c)(2)(A).

Accordingly, the initial decision is hereby AFFIRMED as MODIFIED by this opinion. 9/ The agency is hereby ORDERED to cancel the action effecting appellant's reduction in grade. The agency is hereby ORDERED to award backpay and benefits to appellant in accordance with 5 C.F.R. § 550.805. The agency is hereby ORDERED to submit proof of compliance with this order to the Clerk of the Board within 20 days of the date of issuance of this opinion. Any petition for enforcement of this order shall be made to the Boston Regional Office pursuant to 5 C.F.R. § 1201.181(a).

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

9/ The agency's further assertion that the presiding official erred by not permitting it to prosecute the case under the provisions of 5 U.S.C. Ch. 75 if the case could not be sustained under the provisions of 5 U.S.C. Ch. 43 lacks merit. The Board determined in Gende v. Department of Justice, MSPB Docket No. CH07528410223 (October 22, 1984), that the procedures of Ch. 43 are the exclusive remedy for performance-based actions effected after October 1, 1981. Thus, this case may not be heard as a Ch. 75 action.

In light of our decision that the reduction in grade action must be reversed because of harmful error, we need not address the agency's remaining allegations of procedural error by the presiding official.

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Kathy W. Semonegor

Robert E. Taylor
Clerk of the Board

Washington, D.C.